The background of the slide features a light gray gradient with several realistic water droplets of varying sizes scattered across the top and right sides. The droplets have highlights and shadows, giving them a three-dimensional appearance.

# **THE BIG LIE: FINDING WAYS TO DEFEAT THE CONSENT DEFENSE**

## **DISCLAIMERS**

- THE OPINIONS CONTAINED IN THIS PRESENTATION ARE NOT THOSE OF THE DEPARTMENT OF JUSTICE OR OF MY OFFICE.

## TOP TEN RESPONSES TO THE CONSENT DEFENSE

- ELECTRONIC EVIDENCE
- CORROBORATING WITNESSES
- CAUTIOUS LANGUAGE
- MAKE THE DEFENDANT EAT HIS WORDS
- KNOW HOW TO INTERROGATE
- EMPOWER VICTIMS
- PRESENT A CASE THAT FOCUSES ON EVIDENCE BEYOND CONSENT
- PICK JURORS WITH BACKBONE
- THEMES THAT FIT YOUR FACTS
  - CALL IT WHAT IT IS
- CHOOSE WISELY GRASSHOPPER

## LET'S GET DIGITAL

GETTING INSIDE OF THE DEFENDANT'S HEAD

## GET DIGITAL

- CELL PHONE SEARCHES
- TEXT MESSAGE CONTENT
- LOCATION DATA
- CALL LOGS

## GET DIGITAL

- CELL PHONE SEARCHES
  - DEFENDANT:
    - GET PC TO SEIZE & SEARCH THE DEFENDANT'S PHONE
      - WHAT AM I SEEKING?
  - VICTIM:
    - CONSENT FOR LIMITED SEARCH
      - COMMUNICATION WITH THE DEFENDANT (IF ANY)
      - DISCLOSURE COMMUNICATION
      - POTENTIAL PRE-OFFENSE COMMUNICATION

# GET DIGITAL

- TEXT MESSAGE CONTENT
  - PRESERVATION LETTERS!
  - VICTIM AND OFFENDER COMMUNICATION WITH EACH OTHER
  - EVIDENCE THAT CORROBORATES STATEMENTS OF EITHER PARTY

# GET DIGITAL

- TEXT MESSAGE CONTENT
  - PITFALLS:
    - I-MESSAGING?
    - TEXT APPS?
    - KIK / OTHER MESSAGING SERVICES?

## GET DIGITAL

- LOCATION DATA
  - WHY?
    - WHO WAS WHERE AND WHEN?
    - MAY HELP WITH CASES WHERE PARTIES ARE INTOXICATED
    - USEFUL TO DEFEAT FALSE ALIBIS
    - JURORS LOVE THIS STUFF!
  - CAUTION:
    - ACCURACY VARIES
- CALL LOGS
  - MAY LEAD TO ADDITIONAL WITNESSES
  - AIDS IN CREATING TIMELINE OF EVENTS
  - CORROBORATES WITNESS ACCOUNTS

## GET DIGITAL

- BUT WHAT IF SOME EVIDENCE IS INCONSISTENT WITH VICTIM'S ACCOUNT?
  - DON'T YOU WANT TO KNOW THAT IN ADVANCE OF TRIAL?
  - CHALLENGES TO CONSISTENCY / VERACITY MAY OPEN DOOR TO TESTIMONY ABOUT EFFECTS OF TRAUMA ON MEMORY
  - MAY LEAD TO ADDITIONAL WITNESSES

## GET DIGITAL

- DON'T FORGET SOCIAL MEDIA
  - HASHTAG SEARCHES
  - FACEBOOK PAGES
  - INSTAGRAM POSTS AND MESSAGING

## CORROBORATING WITNESSES

LOCK IN BEFORE THEY CAN BE PERSUADED TO LIE

## CORROBORATING WITNESSES

- FIGURE OUT WHO IS PART OF THE VICTIM'S NARRATIVE OF EVENTS
  - HAVE THESE PEOPLE INTERVIEWED / RECORDED
- REVIEW DEFENDANT'S STATEMENT (WHETHER TO POLICE OR RUMOR MILL)
  - WHO IS MENTIONED OR *SHOULD BE* HERE?
    - UBER DRIVERS
    - NEIGHBORS
    - FRIENDS IN COMMON
  - HAVE THESE PEOPLE INTERVIEWED AND RECORDED

## CORROBORATING WITNESSES

- GOAL:
  - I WANT TO KNOW WHAT THESE WITNESSES ACTUALLY HAVE TO SAY BEFORE THE DEFENDANT OR ANY OTHER PERSON (INCLUDING THE VICTIM) CAN TELL THEM WHAT TO SAY / NOT TO SAY
- RECORDED: NO INSINUATION OR POLICE MISCONDUCT
- ASK THEM ABOUT POST-OFFENSE CONTACT WITH VICTIM / DEFENDANT

## WATCH YOUR WORDS

RAPE  $\neq$  SEX

## WATCH YOUR WORDS

- KEEP IT CLINICAL!



## WATCH YOUR WORDS

- “HE HAD SEX WITH HER” VS. “HE PUT HIS PENIS IN HER VAGINA AFTER SHE TOLD HIM NO, STOP”
- VICTIM’S STORY VS. VICTIM’S ACCOUNT?
- ACCUSER VS. VICTIM’S NAME?
- “IS THIS CONSISTENT WITH ROUGH SEX?”
  - ANS: EXPLAIN WHAT YOU MEAN BY ROUGH SEX.

## WATCH YOUR WORDS

- INVESTIGATORS NEED TO DO THIS AS WELL
  - “SO HE BASICALLY HAD ANAL SEX WITH YOU?”

# UNMASK THE DEFENDANT

JAIL CALLS ARE GOLD

## JAIL CALLS

- FAIR WARNING:
  - THEY WILL SUCK THE LIFE OUT OF YOU
  - THEY WILL MAKE YOU HATE PEOPLE
  - THEY WILL REDUCE THE AMOUNT OF TIME YOU SPEND IN TRIAL . . .

## JAIL CALLS

- GIVE THE JURORS A CHANCE TO SEE WHO THE DEFENDANT REALLY IS
- YOUR DEFENDANT IS NOT THE SUIT-WEARING, “YES MA’AM-ING” PERSON THAT THE JURORS WILL SIT ACROSS FROM AND BOND WITH FOR HOURS
- YOUR DEFENDANT IS THE PERSON IN THE JAIL CALLS
  - COERCION
  - ATTEMPTS TO OBSTRUCT JUSTICE
  - COARSE LANGUAGE WHEN DISCUSSING THE VICTIM

## JAIL CALLS

- REWARDS?
  - DETAILS OF CONSENT DEFENSE
  - ATTEMPTS TO FIND WITNESSES
  - DETAILS THAT CONTRADICT Δ WITNESS ACCOUNTS

# KNOW HOW TO INTERROGATE

"SO WAS THIS ALL CONSENSUAL?"

## SUSPECT INTERVIEWING

- PLEASE TRAIN POLICE:
  - DO NOT SUGGEST CONSENT AS A DEFENSE
  - LET SUSPECT GIVE HIS ACCOUNT
  - IS THERE EVER A NEED TO SUGGEST CONSENT?

## SUSPECT INTERVIEWING

- IF THIS WAS A ROBBERY?
- JURORS BELIEVE THIS STUFF!

## SUSPECT INTERVIEWING

- DETECTIVES SHOULD ALSO WATCH LANGUAGE:
  - “YEAH, I KNOW HOW WOMEN ARE”
  - “HEY, I’VE GOT A CRAZY EX-GIRLFRIEND TOO”
  - “I MEAN, I DON’T EVEN THINK IT’S POSSIBLE TO RAPE A MAN, BUT THAT’S WHAT HE’S SAYING AND I HAVE TO ASK YOU ABOUT IT.”
- YOU WILL SOUND DUMB “EXPLAINING” THIS ON THE STAND

# EMPOWER VICTIMS

THE VICTIMIZING CAN STOP HERE

# EMPOWER VICTIMS

- THE CRIMINAL JUSTICE SYSTEM IS LIKELY FOREIGN TO THE VICTIM
  - WHAT THEY POST / SAY / TWEET, ETC CAN BE USED AGAINST THEM
  - PEOPLE WHO ARE THEIR FRIENDS MAY BETRAY THEM
  - IF THE REPORTER WASN'T YOUR FRIEND BEFORE THE RAPE, SHE ISN'T YOUR "FRIEND" NOW

## EMPOWER VICTIMS

- TEENAGER / YOUNG ADULTS WILL FACE SUBSTANTIAL BETRAYAL BY FRIENDS
  - RECORDED CONVERSATIONS
  - FAKE SOCIAL MEDIA
  - INTENSE ONLINE INTIMIDATION

## EMPOWER VICTIMS

- BE CAUTIOUS WITH SOCIAL MEDIA
- SAVE REPORTERS FOR AFTER TRIAL
- COUNSELING DOESN'T MAKE YOU CRAZY. NOT GETTING COUNSELING WILL MAKE YOU FEEL CRAZY.

## PRESENT A FULL CASE TO JURY

*IF THEY ONLY HEAR ABOUT CONSENT . . .*

## PRESENT A FULL CASE

- TEMPTATION: TO STIPULATE TO THINGS LIKE DNA
  - WHY?
    - MAKES TRIAL GO FASTER
  - WHY NOT?
    - JURORS LIKE CSI EVIDENCE
    - IN A “REAL” RAPE YOU WOULD PRESENT IT
    - GIVES JURORS THE ABILITY TO SEE THAT THIS CASE WAS TAKEN SERIOUSLY



## PRESENT A FULL CASE

- JURORS UNDERSTAND THE CONSEQUENCES OF A RAPE CONVICTION
- YOU ARE ASKING THEM TO CONVICT BASED ON WHAT?
- WHEN THE DEFENSE SAYS IT'S JUST "HE SAID SHE SAID," WHAT WILL YOU SAY?

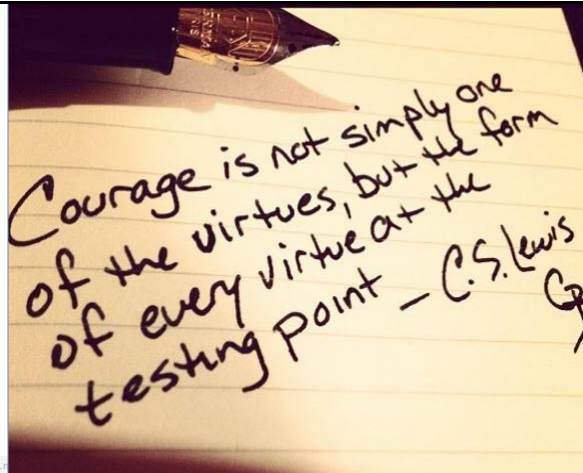
## PRESENT A FULL CASE

- HE SAID, SHE SAID OR
  - DNA REPORTS
  - RAPE KIT
  - BODY DIAGRAMS
  - CRIME SCENE PHOTOS
  - CLOTHING
  - CELL PHONE REPORTS
  - LOCATION CHARTS
  - AERIAL PHOTOS

**COURAGE**  
IS NOT THE  
**ABSENCE**  
OF  
**FEAR**  
IT IS THE  
**ABILITY**  
TO ACT IN THE  
PRESENCE OF  
**FEAR**



GeniusQuotes.com



"It is curious that physical courage should be so common in the world and moral courage so rare."

Mark Twain

## PICK JURORS WITH A BACKBONE

THE COURAGE TO CONVICT

### JURORS WITH A BACKBONE

- WHAT IS THE TOUGHEST DECISION THEY HAVE EVER MADE
- FRIEND WHO THEY BELIEVE HAS BEEN SEXUALLY ASSAULTED
- NOT AFRAID TO STAND UP FOR WHAT THEY BELIEVE IN
  - BUT NOT OPPOSITIONAL DEFIANT ☺

## JURORS WITH A BACKBONE

- EVER COMMENTED ONLINE ABOUT A RAPE ALLEGATION?
- WHEN A FAMOUS ATHLETE IS ACCUSED OF A CRIME, WHAT IS YOUR RESPONSE?
- HAVE YOU EVER KNOWN SOMEONE WHO COMMITTED A CRIME THAT SURPRISED YOU?

## JURORS WITH BACKBONE

- JURORS TO AVOID?
  - MY RELIGION SAYS . . .
  - I'M AFRAID OF RUINING SOMEONE'S LIFE
  - I'M NOT GOOD AT DECIDING
  - A FRIEND OF MINE GOT ACCUSED OF THIS . . .
- TALK WITH JURORS AFTER VERDICTS?

# NARRATIVES THAT RESOUND

MAKE YOUR THEME FIT THE FACTS

## THEME

- YOUR THEME - WORKED FROM VOIR DIRE TO VERDICT - SHOULD BE THE SCRIPT THAT GIVES JURORS THE COURAGE TO CONVICT
- WHY ARE YOU CONVINCED THIS DEFENDANT IS GUILTY?
- WHY ARE YOU CONVINCED THIS VICTIM IS TELLING THE TRUTH?
- WHY IS THE DEFENDANT'S BEHAVIOR WRONG?

## THEME

- TAILORED TO YOUR FACTS
- DESIGNED TO ADDRESS JURY MYTHS
- POLITE CONFRONTATION

## THEME

- REBUT THE UNDERLYING DEFENSE MESSAGE
  - A WOMAN LIKE HER CAN'T BE RAPED
  - MEN CAN'T BE RAPED BECAUSE THEY ARE STRONG ENOUGH TO FIGHT OFF AN ATTACKER.
  - TEENAGERS ARE SEDUCING ADULTS AND THE "PERP" IS THE REAL VICTIM

## CHOOSE WISELY GRASSHOPPER

PROSECUTION ISN'T ALWAYS THE ANSWER

## CHOOSE WISELY

- JURORS NEVER SEE / LEARN ABOUT:
  - ALL OF THE CASES THAT YOU TURN DOWN
  - MOST "BAD FACTS" ABOUT THE DEFENDANT
  - WHAT ELSE?
- JURORS DON'T VIEW THE CASE IN COMPARISON TO OTHER CASES IN YOUR OFFICE
  - THEY SEE THIS ONE AND ASK "IS THIS WHAT I THINK RAPE IS?"

## CHOOSE WISELY

- CHARGING DECISIONS:
  - SOMETIMES, THE RIGHT DECISION IS TO DECLINE PROSECUTION
  - VICTIM INVOLVEMENT IN CHARGING DECISIONS

## CHOOSE WISELY

- PLEA NEGOTIATIONS
  - CAN YOU GET THINGS THAT THE VICTIM WANTS WITHOUT TRIAL?
  - CAN YOU MAKE THE COMMUNITY SAFER WITHOUT TRIAL?

## CHOOSE WISELY

- VICTIM EMPOWERMENT DOESN'T HAVE TO COME FROM A GUILTY VERDICT
- WHEN THE VERDICT IS NOT GUILTY?
  - WILLINGNESS TO MEET AND ANSWER QUESTIONS
  - FOLLOW-UP COMMUNICATION
  - PROTECTIVE ORDERS AS BACK-UP